BAHAROM ABDULLAH

v.

HUP LEAK ENTERPRISE SDN BHD

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: 12-21-99]
1 FEBRUARY 2000

CIVIL PROCEDURE: *Appeal - Appeal to judge in chambers - Notice of appeal - Whether notice must be filed at registry of High Court - Whether filing of notice at registry of subordinate court sufficient - Subordinate Courts Rules 1980, O. 49 r. 6(2)*

CIVIL PROCEDURE: *Appeal - Record of appeal - Contents of - Inclusion of unrequired documents - Whether record of appeal defective - Whether appeal void - Whether irrelevant documents to be expunged - Subordinates Courts Rules 1980, O. 49 r. 6(3)*

The appellant filed an application to reinstate his action against the respondent after it had been struck off by the court. The Sessions Court dismissed the application and the appellant appealed to the judge in chambers. At the hearing of the appeal, the respondent raised two preliminary objections, *ie*, (1) the appellant should have filed his notice of appeal in the registry of the High Court and not the registry of the Sessions Court; and (2) the appellant had failed to comply with O. 49 r. 6(3) Subordinate Courts Rules 1980 ('SCR') as the record of appeal contained irrelevant documents.

Held:

[1] Order 49 r. 6(2) SCR does not require an unsuccessful litigant to lodge his notice of appeal with the registry of the High Court; it is sufficient that the notice of appeal is filed with the registry of the subordinate court.

[2] The documents included in items 6 to 16 of the record of appeal ought to be expunged as they were irrelevant to the appeal.

[3] However, the wrongful inclusion of the irrelevant documents did not render the appeal process void as the other requirements of O. 49 r. 6(3) SCR had been complied with.

[Preliminary objections dismissed.]

a **Case(s) referred to:**
DJ Design & Supplies Sdn Bhd v. Public Bank Bhd [1997] 5 MLJ 465 ***(refd)***
Ismail Abdul Hamid v. OSK & Partners Sdn Bhd [1997] 1 CLJ 583 ***(foll)***
Pandan Maju Sdn Bhd v. Dulon Industries Sdn Bhd [1995] 4 MLJ 737 ***(refd)***
Smallholders Development Corp Sdn Bhd v. Salamiah Adnan [1997] 1 AMR 723 ***(refd)***

b **Legislation referred to:**
Interpretation Act 1967, s. 71
Rules of the High Court 1980, O. 55
Subordinate Courts Rules 1980, O. 1 r. 8, O. 26A, O. 49 rr. 2, 6(2), (3)

c *For the appellant - Harinder Singh; M/s Mahinder & Co*
For the respondent - Jefri Jaafar; M/s Wong Lu Peen & Tunku Alina

Reported by Izzaty Izzuddin

JUDGMENT

d **Abdul Kadir Sulaiman J:**

In this decision the appellant and the respondent for convenience are to be referred to respectively as the plaintiff and the defendant. The plaintiff took up a summons in the Sessions Court at Kemaman against the
e defendant for negligence. On 14 September 1998 the action was set down for mention to determine the date of the hearing of the suit. The plaintiff, represented by Messrs. Mahindar & Co. from Kuantan, Pahang, requested the assistance of a local counsel from Messrs. V.P. Nathan to mention the case on its behalf on that day before the Sessions Court to get the date of
f the hearing of the action. The solicitors for the plaintiff were subsequently informed by the solicitor who mentioned on their behalf that the hearing of the action had been fixed for 8 February 1999. However, on 8 February 1999 when the counsel for the plaintiff attended court for the intended hearing he discovered that the action was not on the cause list for the day.
g Upon inquiries made with the court registry, it was informed that the matter was actually fixed for hearing on 11 September 1998 and as the parties did not appear on that day, the suit of the plaintiff had been struck off by the court.

Following that, the plaintiff filed in the Kemaman Sessions Court an
h application for the action to be reinstated. Having heard the application, the court on 27 June 1999 disallowed it. Hence this appeal by the plaintiff to the judge in chambers against the said decision of the subordinate court.

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In this appeal which was made pursuant to O. 49 r. 6 of the Subordinate Courts Rules 1980 ("the SCR 1980"), the plaintiff filed its notice of appeal with the registry of the Sessions Court and not with the registry of the High Court. Subsequently the plaintiff filed and served its Petition of Appeal. In the said Petition of Appeal it included other matters than those required by O. 49 r. 6(3) of the SCR 1980 as evidenced in the index from item 6 to item 16 therein.

At the inception of the hearing of this appeal of the plaintiff the defendant raised two preliminary objections. They are that the plaintiff as an appellant should have filed its notice of appeal in the registry of the High Court as so required by O. 49 r. 6(2) of the SCR 1980. Secondly, the intended appeal by the plaintiff being one in respect of a decision made by the subordinate court other than a decision made after trial which is governed by O. 49 r. 6 of the SCR 1980, the record of appeal of the plaintiff should not contain other matters than that allowed by O. 49 r. 6(3) of the SCR 1980. As the plaintiff had failed to comply with the requirements of the said r. 6(2) and (3), there is no proper appeal brought before this court and therefore, it ought to be dismissed.

Order 49 r. 6 of the SCR 1980 states as follows:

> 6(1) **Notwithstanding anything contained in this Order**, an appeal shall lie to a Judge in Chambers from any decision made by the Court **other than a decision made after trial.**
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> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings **within the time limited for the filing of appeal to the Registrar of the High Court.**
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> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and **the record shall contain copies of** –
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> (a) the application for the decision;
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> (b) the statement of claim, and where defence has been filed, the statement of defence;
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> (c) all affidavits filed in support of or in opposition to the application;
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> (d) the decision appealed from,
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> **but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.** (emphasis added).

The first issue raised in the objection is a serious one. If the contention of the defendant is correct, there is in fact no appeal being brought before this court over the decision of the learned Sessions Judge dismissing the plaintiff's application for the reinstatement of its suit against the defendant. Notwithstanding the Court of Appeal decision in *Ismail Abdul Hamid v. OSK & Partners Sdn. Bhd.* [1997] 1 CLJ 583, the learned counsel argues that the notice of appeal of the plaintiff is in infringement of the express provisions of O. 49 r. 6(2) of the SCR 1980 which requires "for the filing of appeal to the Registrar of the High Court". In support, the learned counsel cited *DJ Design & Supplies Sdn Bhd v. Public Bank Bhd* [1997] 5 MLJ 465 and *Smallholders Development Corp Sdn Bhd v. Salamiah bte Adnan* [1997] 1 AMR 723, both being the decisions of mine. The learned counsel at the same time also cited cases holding the opposite views to mine. They are *Pandan Maju Sdn Bhd v. Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 and a few decisions of other High Courts.

In *Ismail Abdul Hamid*, the appellant against whom a summary judgment was entered in the Sessions Court under O. 26A of the SCR 1980 had appealed to the High Court against the said judgment. He filed his notice of appeal in the Sessions Court. In the result the High Court held that the appeal was out of order as the appellant's notice of appeal was filed in the Sessions Court instead of the Registry of the High Court as it should have been. The appellant appealed to the Court of Appeal against the said ruling of the High Court. Now, the same thing happens here in respect of the plaintiff in initiating this appeal. The Court of Appeal allowed the appellant's appeal and held that O. 49 r. 6(2) of the SCR 1980 does not require an unsuccessful litigant to lodge his notice of appeal with the Registrar of the High Court; it is sufficient that he files the notice with the Registrar of the subordinate court. Hence, that would answer the first preliminary objection raised by the defendant here. This court is bound by that decision of the Court of Appeal.

However, the learned counsel for the defendant pursued his arguments and maintained that the provisions of O. 49 r. 6(2) of the SCR 1980 intended otherwise. I could have stopped him from pursuing the matter further in the light of the binding decision of the Court of Appeal on this subject. But in the light of his forceful submissions I allowed him to submit with a hope that after hearing all the submissions by both sides on the matter the air would be clearer and the Court of Appeal may like to have a second look, so to speak, on this issue should there be an appeal to it in respect of this present matter. The learned counsel for the defendant agreed that in respect of both nature of appeal under O. 49 (in respect of any decision made by the court after trial or otherwise) Form 140 should be filed as

the notice of appeal. This Form 140 is the form in Schedule A to the SCR 1980. This Form has been there before the incorporation of the new O. 49 r. 6. It created no problem in its usage before the incorporation of the new O. 49 r. 6 because it was created solely for the use of an appeal under O. 49 r. 2 of the SCR 1980. The addressees named therein are the Registrar, Sessions Court and the magistrate suggesting that the notice of appeal in that form be filed in the registry of the subordinate court. O. 49 r. 6 has created a new situation differentiating the procedure in respect of appeal from any decision made by the court other than a decision made after trial from any decision made by the court after trial, which O. 49 r. 2 is all about. The opening words in O. 49 r. 6(1) suggest this. An appeal under O. 49 r. 2 is to the judge in open court whilst an appeal under O. 49 r. 6 is to a judge in chambers. Such a nature of the latter appeal being by way of a rehearing as if the matter comes before the court for the first time, O. 49 r. 6(3) expressly excludes the need for the filing of the notes of evidence, the grounds of judgment or any memorandum of appeal. In the circumstances, there is not the need "to draw the attention of the deciding court of the fact that its order is being challenged at the appellate level so that the judicial arbiter, be it magistrate or Sessions Judge, may produce written reasons for the decision appealed against". However, in the case of an appeal against a decision made after trial, there is indeed a real need for the notice of appeal to be filed in the registry where the impugned decision arose because of the need for the trial court to make available the notes of evidence and the grounds of judgment as so required by O. 49 r. 2 and for the appellant to prepare the memorandum of appeal as so required by O. 55 of the Rules of the High Court 1980. This is not so for the purpose of the present appeal being a retrial of the matter by the judge in chambers.

It is further argued that the second limb to O. 49 r. 6(2) which this plaintiff's appeal is concerned, clearly indicates as to where this nature of the notice of appeal should be filed. Specifically, this limb refers to the serving of a copy of the notice of appeal on every other party to the proceedings. This service must be done within a stipulated period. This stipulated period for service of the notice of appeal is pegged to "within the time limited for the filing of the appeal to the Registrar of the High Court". It is clear therefore, that the filing of the notice of appeal under O. 49 r. 6 must be with the registry of the High Court and nowhere else. It is argued that the phrase "to the Registrar of the High Court" found therein cannot be related to the service of a copy of the notice of appeal as the service so required is only "on every other party to the proceedings" which in this case is the defendant. There is no requirement of the service to be done on the Registrar of the High Court. If that be so, the said phrase

must necessarily relate to the place where a notice of appeal in respect of any decision made by a subordinate court other than a decision made after trial is to be filed. As to the use of the common Form 140 in respect of both nature of appeal, despite the addressees of the notice of appeal quoted therein, O. 1 r. 8 of the SCR 1980 and in particular, s. 71 of the Interpretation Act allow such variations be made to suit the particular circumstances of the particular case. As O. 49 r. 6(2) requires such notice of appeal be filed with the Registrar of the High Court, the addressee in Form 140 could be varied accordingly.

Of special interest, the learned counsel posed the question as to the need at all for the incorporation of O. 49 r. 6(2) of the SCR 1980 if the normal procedure prescribed under O. 49 r. 2 as regards the filing of the appeal is concerned. Therefore, he contends that it must have been the express intention of the legislature to make provisions for a different practice and procedure to be followed when dealing with appeals from the decisions of subordinate courts to a judge in chambers in respect of decision made other than a decision made after trial. It was also stressed that the provisions under r. 6 is mandatory by virtue of the use of the peremptory word "shall" and therefore, left the court with no discretion to exercise.

The reply by the learned counsel for the plaintiff is brief and simple. The decision of the Court of Appeal in *Ismail Abdul Hamid* settles the matter and it binds this court. Therefore, what the plaintiff has done in filing the notice of appeal in the registry of the subordinate court was in accordance with the rule and the law. He contends that in the light of the requirement of O. 49 r. 6(2) on the use of Form 140, O. 1 r. 8 of the SCR 1980 and s. 71 of the Interpretation Act would not help.

As I mentioned earlier the strong arguments put forward by the learned counsel for the defendant are worthy of a second look but as for this court now, I have to agree with the submissions of the learned counsel for the plaintiff in that the Court of Appeal decision binds this court as relates to the place where the notice of appeal should be filed in matters of appeal coming under O. 49 r. 6 of the SCR 1980. Accordingly, the first preliminary objection of the defendant fails.

Moving now to the second preliminary objection as to the content of the plaintiff's petition of appeal. It is the contention of the defendant that by including matters contained in items 6 to 16 of the index to the record of appeal, the plaintiff is introducing fresh evidence in an appeal as those matters were not at all in issue before the Kemaman Sessions Court while making its decision disallowing the application of the plaintiff for reinstatement of its action after it having been struck off by the court for

the absence of the plaintiff on the scheduled date of hearing of the action on 11 September 1998. Further, they are not those groups of documents envisaged by O. 49 r. 6(3) of the SCR 1980. Looking at the affidavit in support of the plaintiff in its application for reinstatement of the action, those documents included in items 6 to 16 of the index were not issues before the Sessions Court as the only ground given for seeking reinstatement of the suit was over the confusion in the actual date fixed for the hearing of the action before the Sessions Court and the plaintiff sought forgiveness from the court for the happenings and was never intended to mean an act of contempt on its part. The reply from the learned counsel for the plaintiff is simply that those documents are documents contained in the plaintiff's bundle which had been served on the defendant for the purpose of the trial of the suit had it not been struck off by the lower court. In the circumstances I would agree with the contention of the learned counsel for the defendant and as such those documents ought to be expunged from the record of appeal, they being irrelevant to the appeal. However, their wrong inclusion would not, in my mind, render the appeal process void as the other requirements of O. 49 r. 6(3) had been complied with. For the reason given, the objection on this ground also fails.

Having dismissed the two preliminary objections raised on behalf of the defendant, I will now proceed to hear the appeal of the plaintiff on its merit.